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IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 803

MRS. KATIE LYONS BYRD,
Petitioner,

versus

THE NAPOLEON AVENUE FERRY COMPANY, INC.,
Respondent.

Petition For Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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INDEX

	Page
Opinions of the Courts Below	1
Grounds for the Court's Jurisdiction	2
Question Presented for Review	2
Constitutional Provisions Involved	3
Statement of the Case	3
Reasons for Allowance of the Writ	5
Argument	6
Appendix:	
1. Opinion of the Court of Appeals	I

AUTHORITIES CITED

American Stevedores v. Porello, 330 U.S. 446 (1947) ... 16
Garrett v. Moore-McCormack Co.,
317 U.S. 239, 243-246; 63 S. Ct. 246, 87 L. Ed 239 ..5, 20
Hubgh v. N. O. & C. R. R. Co.,
6 La. Ann. 495, 54 Am. Dec. 565 (1851) 8
Just v. Chambers, (1941) 312 U.S. 383,
61 S. Ct. 687, 85 L. Ed 903 15
O'Leary v. U. S. Lines Co., (1st Circ. 1954),
215 F. (2d) 708, Cert. den. 75 S. Ct. 360,
348 U.S. 939, 99 L. Ed. 735 .....14, 21
Panama R. Co. v. Johnson, 264 U.S. 375, 386,
44 S. Ct. 391, 68 L. Ed. 748 .....4, 5, 20
Pope & Talbot, Inc. v. Hawn, (1953) 346 U.S. 406,
74 S. Ct. 202, 98 L. Ed. 143 .....4, 5, 20
Western Fuel Co. v. Garcia, (1921) 257 U.S. 233,
42 S. Ct. 89, 66 L. Ed. 210 16
Louisiana Civil Code Article 2315 3
Louisiana Civil Code Article 2323 11

IN THE
SUPREME COURT OF THE UNITED STATES

No.

MRS. KATIE LYONS BYRD,
Petitioner,

versus

THE NAPOLEON AVENUE FERRY
COMPANY, INC.,
Respondent.

Petition for Writ of Certiorari to the United States
Court of Appeals for the Fifth Circuit

MAY IT PLEASE THE COURT:

The petition of Mrs. Katie Lyons, widow of Merrill Q. Byrd, with respect shows unto this Honorable Court:

OPINIONS OF THE COURTS BELOW

The opinion of the District Court, MRS. KATIE LYONS BYRD v. THE NAPOLEON AVENUE FERRY COMPANY, INC., as printed in the Transcript of the Record at page 386 et seq., is reported in 125 F. Supp. 573.

The opinion of the Court of Appeals, THE NAPOLEON AVENUE FERRY COMPANY, INC. v. MRS. KATIE LYONS BYRD, and Reverse Title, as printed in the Appendix

hereto at page I, is reported in 227 F. (2) 958, (5th Cir. Dec. 1955), and, in the form of a one-sentence Per Curiam, adopted the Opinion of the District Court below.

GROUNDS FOR THE COURT'S JURISDICTION

The decree sought to be reviewed was rendered and entered December 30, 1955.

The jurisdiction of this Honorable Court is invoked under the Act of June 25, 1948, c. 646, 62 Stat. 928, 28 USCA 1254(1).

QUESTION PRESENTED FOR REVIEW

This petition involves the following question for determination by this Honorable Court:

1. In an action in Admiralty by a widow against a shipowner for the death of her husband, who was a passenger on a ferry, killed as a result of a maritime tort which occurred over navigable waters within the boundaries of the State of Louisiana, in which the widow utilized the Louisiana statutory remedy of survivorship and of wrongful death as a supplement to the general maritime law, should the Court apply the general maritime law of apportionment of damages or should the Court apply the common law jurisprudence of the State of Louisiana whereunder contributory negligence would completely bar recovery?

The District Court sitting in Admiralty and the Court of Appeals held that the common law jurisprudence of the state — to the effect that any degree of contributory negligence

constituted a complete bar — exclusively governed this admiralty action for death resulting from a maritime tort which occurred within the State of Louisiana.

CONSTITUTIONAL PROVISION INVOLVED

The constitutional provision applicable is that portion of Article 3, Section 2 of the Constitution of the United States, as follows:

> "The judicial power shall extend . . . to all cases of admiralty and maritime jurisdiction . . ."

STATEMENT OF THE CASE

This was a libel in personam in admiralty by a passenger (Petitioner herein) against a ship owner for damages for her own personal injuries and for the personal injuries and death of her husband, as a result of a maritime tort which occurred over navigable waters within the State of Louisiana. Libellant (Petitioner herein) was injured and her husband, Merrill Byrd, was drowned when a vehicle driven by him, and in which Libellant was a passenger, was caused to fall into the Mississippi River while debarking from a ferry owned and operated by Respondent, as a result of Respondent-Shipowner's negligence. Libellant claimed damages for her own injuries and for the injuries and death of her husband under the general maritime law, as *supplemented* (insofar as her husband's death is concerned) by the Louisiana Survivorship and Wrongful Death Statute, Louisiana Revised Civil Code, Article 2315.

The District Judge (Hon. J. Skelly Wright) found, and so stated in his written opinion, that Respondent's facilities ". . . do not measure up to the standard of safety required by law"; were so dangerous that they constituted a *"death trap"* and that "such conditions were *calculated* to make a car which approached the apron at a speed other than dead slow go *out of control* and possibly into the river, just 10 feet away". (Opinion, p. 395 of Record). Accordingly, the District Court rendered a decree in favor of Libellant, Mrs. Byrd, for her own personal injuries, but dismissed her action for the injuries and death of her husband for the reason that he was guilty of some degree of contributory negligence, which, under the jurisprudence of the State of Louisiana, completely barred any recovery for his death (emphasis ours).

Both Libellant and Respondent appealed to the Court of Appeals for the Fifth Circuit. Libellant urged (1) that the very slight negligence of Mr. Byrd, if any, did not proximately contribute to his death since Respondent created the death trap and also failed to provide any barriers whatsoever as required by law; and, (2) that since Mr. Byrd's death resulted from a *maritime tort* — "a type of action which the constitution has placed under national power to control in its substantive *as well as its procedural features*" (*Pope & Talbot v. Hawn*, 1953, 346 U.S. 406, 74 S. Ct. 202, 98 L. Ed. 143; *Panama R. Co. v. Johnson*, 264 U.S. 375, 386, 44 S. Ct. 391, 68 L. Ed. 748 — the court should apply the Admiralty rule which allows such consideration of contributory negligence merely in mitigation of damages, instead of the harsh common law rule under which the very slightest degree of negligence wholly barred recovery.

The Court of Appeals affirmed the District Court and, in the form of a one-sentence Per Curiam, adopted the Opinion of the District Court below (Opinion, Appendix hereto, p. I).

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT:

1. That the decision and opinion herein are in direct and abrupt conflict with the doctrines and rules of law established by the United States Supreme Court in *Pope & Talbot, Inc. v. Hawn*, 346 U.S. 406, 74 S. Ct. 202, 98 L. Ed. 143 (1953); *Garrett v. Moore-McCormack Co.*, 317 U.S. 239, 243-246, 63 S. Ct. 246, 87 L. Ed. 239, and cases therein cited; *Panama R. Co. v. Johnson*, 264 U.S. 375, 386, 44 S. Ct. 391, 68 L. Ed. 748.

2. That the United States Court of Appeals, Fifth Circuit, by its decision herein has decided an important question of law in direct and *acknowledge conflict* (note opinion, p. 391 of Record " . . . Libellant, with some support from First Circuit in *O'Leary v. U. S. Lines*, decided September 1, 1954, contends . . .") with the decision of the First Circuit in *O'Leary v. U. S. Lines*, (1954), 215 F. (2d) 708, cert. den., 75 S. Ct. 360, 348 U.S. 939, 99 L. Ed. 735.

3. That the United States Supreme Court has never before been called upon to decide the issue involving facts identical to those presented in the instant case. There is presented here an important question, national in scope, and rocking the foundation

of admiralty principles, that should be settled by this Court in order to correct the incongruous result reached by the Fifth Circuit: And, that is, the application, by a Court sitting in Admiralty, of the general maritime law (of mitigation of damages) to one person, and the state common law (contributory negligence as a complete bar) to another person — both of whom were sitting side by side and both of whose actions were based on the *same maritime tort!!*

The United States Supreme Court should now decide the question as to which law—i.e., whether the general *maritime* law of mitigation of damages, or the state common law jurisprudence whereunder contributory negligence is a complete and absolute bar to recovery — applies to a *maritime* tort occurring within the borders of a state, in cases involving death where the state wrongful death statute is used to *supplement* the general maritime law.

ARGUMENT

This was a libel in personam in admiralty by a passenger against a shipowner for damages for her own personal injuries and for the personal injuries and death of her husband, as a result of a maritime tort which occurred over navigable waters within the State of Louisiana. Libellant was injured and her husband, Merrill Byrd, was drowned when a vehicle driven by him, and in which Libellant was a passenger, was caused to fall into the Mississippi River while debarking from a ferry owned and operated by Respondent, as a result of Respondent-Shipowner's negligence.

Libellant claimed damages for her own injuries and for the injuries and death of her husband under the general maritime law, as *supplemented* (insofar as her husband's death is concerned) by the Louisiana Survivorship and Wrongful Death Statute, Louisiana Revised Civil Code, Article 2315.

The District Judge (Hon. J. Skelly Wright) found, and so stated in his written opinion, that Respondent's facilities, ". . . do not measure up to the standard of safety required by law"; were so dangerous that they constituted a *"death trap"* and that "such conditions were *calculated* to make a car which approached the apron at a speed other than dead slow *go out of control* and possibly into the river, just 10 feet away" (Opinion, p. 395 of Record). Accordingly, the District Court rendered a decree in favor of Libellant, Mrs. Byrd, for her own personal injuries, but dismissed her action for the injuries and death of her husband for the reason that he was guilty of some degree of contributory negligence, which, under the jurisprudence of the State of Louisiana, completely barred any recovery for his death (emphasis ours).

It is, therefore, respectfully submitted that the Court of Appeals erred in failing to hold that the general maritime law of mitigation of damages, rather than the common law jurisprudence of the State of Louisiana relating to contributory negligence, applied exclusively to the widow's suit against this Respondent ship owner for the death of her husband, as a result of this maritime tort which occurred over navigable waters within the boundaries of the State of Louisiana, wherein the widow availed herself of the Louisiana Statute (Civil Code Article 2315, which provides a

remedy of survivorship and of wrongful death), as a *supplement* to the general maritime law.

The Court of Appeals further erred wherein it adopted the District Court Opinion (p. 390) to the effect that, "She (Libellant) claims damages for her own injuries under the general maritime law and for the death of her husband under the Louisiana Wrongful Death Statute . . ." This is erroneous in that Libellant sought recovery for her own injuries *and* for the death of her husband under the general maritime law, *as supplemented* — insofar as her husband's death is concerned — by the Louisiana statute; the latter merely furnished her a remedy (survivorship of action) to enforce a right "rooted in maritime law," (i.e., the right of a passenger to sue a shipowner for a maritime tort occurring over navigable waters).

For a proper decision in the instant case, we must analyze and understand the basic Louisiana law — both statutory (codal law) and jurisprudence (so-called common, or case, law) — of negligence, contributory negligence, survivorship of actions and actions for wrongful death.

Our basic tort article (2315) as originally enacted in our Civil Code of 1825 (originally Article 2294) merely gave the right to sue for negligence; thus: "Every act whatsoever of man, that causes damage to another, obliges him by whose fault it happened, to repair it".

Louisiana courts, however, interpreted this article as not providing a remedy for heirs for either survival of action or for wrongful death. *Hubgh v. N. O. & C. R. R. Co.*, 6 La. Ann. 495, 54 Am. Dec. 565 (1851).

Accordingly, Article 2315 was amended in 1855 by adding to the basic article, in order to provide a remedy to heirs for survival of actions. It was further amended in 1884, to give the heirs a remedy for wrongful death.

The article (2315) contains a prescriptive period of one year, within which time all actions thereunder must be brought.

Article 2315 of the Louisiana Revised Civil Code of 1870, as amended, reads as follows:

2315 (2294) (N 1382).

Torts — Liability — Survival of Action

"Every act whatever of man that causes damage to another, obliges him by whose fault it happened to repair it; the right of this action shall survive in case of death in favor of the children, including adopted children, or spouse of the deceased, or either of them, and in default of these in favor of the surviving father and mother or either of them, and in default of any of the above persons, then in favor of the surviving brothers and sisters, or either of them, for the space of one year from the death; provided that should the deceased leave a surviving spouse, together with minor children, the right of action shall accrue to both the surviving spouse and minor children; provided further, that the right of action shall accrue to the major children only in those cases where there is no surviving spouse or minor child or children.

"If the above right of action exists in favor of an adopted person, such right of action shall survive in case of death in favor of the children or spouse of the deceased, or either of them, and in default of these in favor of the surviving adoptive parents, or either of them, and in default of any of the above persons, then in favor of the surviving children of the adoptive parents, or either of them, and in default of these in favor of the surviving father and mother of the adopted person, or either of them, and in default of these, then in favor of the surviving brothers and sisters of the adopted person, or either of them, for the space of one year from the death.

"The survivors above mentioned may also recover the damages sustained by them by the death of the parent or child or husband or wife or brothers or sisters or adoptive parent, or parents, or adopted person, as the case may be." (As amended, Acts 1884, No. 71; 1908, No. 120; 1918, No. 159; 1932, No. 159, ss. 1.)

It is to be noted that *nowhere in the entire Louisiana Civil Code,* much less in Article 2315 which creates the remedy for wrongful death actions, is there any reference or basis for the application of the doctrine of contributory negligence. The original article from the Napoleonic Code on which Article 2315 was based, the French Jurisprudence, and many French and American writers have eliminated any basis for the adoption of the doctrine of contributory negligence; on the contrary, the basis for the doctrine of mitigation of damages, by virtue of Article 2323, is the only

reference in our Code (Dean Prosser on Torts, 11 T.L.R. 112; 16 T.L.R. 386, 419).

Article 2323 reads as follows:

> "The damage caused is not always estimated at the exact value of the thing destroyed or injured; it may be reduced according to circumstances, if the owner of the thing has exposed it imprudently."

Now we must consider the very significant leading case of *Pope & Talbot, Inc. v. Hawn*, 346 U.S. 406, 74 S. Ct. 202, 98 L. Ed. 143 (1953), wherein the facts, stated in opinion, were as follows:

> "The respondent Charles Hawn sustained severe physical injuries when he slipped and fell through an uncovered hatch hole on the petitioner Pope & Talbot's vessel. The ship was then berthed at a pier located *in Pennsylvania waters* of the Delaware River . . ."

> ". . . Hawn brought this civil action in a United States District Court to recover damages for his injuries. His complaint charged that his injuries resulted from the vessel's unseaworthiness and from Pope & Talbot's negligence. In answering, Pope & Talbot denied both charges and set up contributory negligence as a defense to each . . ."

Among other holdings, the *Pope & Talbot* case decided that, notwithstanding the injury occurred over navigable waters within the boundaries of the State of Pennsylvania,

and notwithstanding the action was brought on the law side and jurisdiction was based on diversity of citizenship; (1) The Federal Maritime Law (of mitigation of damages) and not the Pennsylvania State Law (of contributory negligence) controlled; (2) *"The harsh rule of the common law under which contributory negligence wholly barred an injured person from recovery is completely incompatible with modern admiralty policy and practice"; (3) since ". . . he was injured on NAVIGABLE WATERS . . . the basis of (his) action is a MARITIME TORT . . ."* and subject to federal control in "its substantive as well as its procedural features"; and (4) ". . . a state may not *deprive* a person of any substantial admiralty rights as defined in controlling acts of Congress or by interpretative decisions of this court." (Emphasis ours).

Mr. Justice Black, in the majority opinion, states:

> "Petitioner urges that the jury finding of contributory negligence should have been accepted as a complete bar to Hawn's recovery. The contention appears to rest on two separate bases: (a) Admiralty has not developed any definite rule as to the effect of contributory negligence, and therefore the common-law rule under which contributory negligence bars recovery should govern in admiralty, (b) Pennsylvania law controls this case and under that state's law any contributory negligence of an injured person is an insuperable bar to his recovery."

"(a) *The harsh rule of the common law under which contributory negligence wholly barred an injured person from recovery is completely incompatible with modern admiralty policy and practice.* Exercising its *traditional discretion*, admiralty has developed and now follows its own fairer and more flexible rule which allows such consideration of contributory negligence in mitigation of damages as justice requires. Petitioner presents no persuasive arguments that admiralty should now adopt a discredited doctrine which automatically blots out all claims of injured persons who have contributed to their injuries in any degree, however slight.

"(b) Nor can we agree that Hawn's rights must be determined by the law of Pennsylvania, under which, it is said, any contributory negligence would bar all recovery in this personal injury action. True, Hawn was hurt inside Pennsylvania and ordinarily his rights would be determined by Pennsylvania law. *BUT he was INJURED ON NAVIGABLE WATERS* while working on a ship to enable it to complete its loading for safer transportation of its cargo by water. *CONSEQUENTLY, the BASIS OF HAWN'S ACTION IS A MARITIME TORT,* a type of action which the Constitution has placed under national power to control in *'its substantive as well as its procedural* features . . . ' Panama R. Co. v. Johnson, 264 U.S. 375, 386. And Hawn's complaint asserted no claim created by or arising out of, Pennsylvania law. His right of recovery for unseaworthiness *'and NEGLIGENCE' is rooted in federal maritime law. Even if Hawn were seeking to*

> *enforce a state-created remedy for this right, federal maritime law would be controlling.* While states may sometimes *supplement* federal maritime policies, a state *may not deprive* a person of any substantial admiralty rights as defined in controlling acts of Congress or by interpretative decisions of this Court. These principles have been frequently declared and we adhere to them. See e.g., Garrett v. Moore-McCormack Co., 317 U.S. 239, 243-246, and cases there cited." (Emphasis ours).

Mr. Justice Frankfurter, in his concurring opinion, stated:

> "We are told that Hawn's *right* of recovery for unseaworthiness and negligence is rooted in federal maritime law'. No case or student of admiralty is cited in support of this statement."
>
> "We should not commingle federal admiralty and state common law and should not engraft onto the federally created right to recover for unseaworthiness a common law defense foreign to that right."

Following on the heels of *Pope & Talbot* is the very recent case of *O'Leary v. U. S. Lines Co.*, (1st Circ. 1954), 215 F. (2) 708, cert. den., 75 S. Ct. 360, 348 U.S. 939, 99 L. Ed. 735:

Sarah O'Leary, administratrix, brought an action against a shipowner to recover for the injury and death of her stevedore husband alleged to have been negligently inflicted. The complaint is in two counts: The first count, for recovery under the wrongful death portion of the Massachusetts version of Lord Campbell's Act; the second count was for de-

cedent's pain, expenses and loss of wages under the survival of actions portion of the Massachusetts act. Federal jurisdiction was based upon diversity and jurisdictional amount.

Based upon the holding of the United States Supreme Court in *Pope & Talbot*, the *O'Leary* case held that *maritime rather than Massachusetts law of contributory negligence applies to widow's suit against shipowner under Massachusetts wrongful death act for her husband's death while helping to load ship in Boston Harbor, thus:*

> "In Just v. Chambers, 312 U.S. 383 (1941) the Supreme Court held that the maritime law was augmented or supplemented by state statutes providing for the survival of actions of tort against the estates of deceased tort feasors, so that in consequence a plaintiff might maintain an action against the estate of a deceased shipowner to recover for injuries resulting from a maritime tort occurring within the territorial waters of the state. Although authority seems to be lacking, no doubt by parity of reasoning the converse is also true, and the plaintiff is entitled by the Massachusetts survival statute cited above to maintain the cause of action stated in the second count of her complaint for her deceased husband's pain, mental anguish, loss of wages, and medical expenses. Nor can there be any doubt whatever that she may maintain the cause of action stated in the first count of her complaint for it has long been settled that a *state created REMEDY* for wrongful death will be enforced both in the admiralty courts and in proceedings under the saving clause when death results from *a tort*

committed on navigable waters within a state whose statute provides such a remedy. The Hamilton, 207 U.S. 398 (1907); Western Fuel Co. v. Garcia, 257 U.S. 233 (1921); American Stevedores v. Porello, 330 U.S. 446 (1947), and the cases cited therein. See also the discussion in Just v. Chambers, supra."

"But, although it is perfectly clear that the plaintiff may look to the Massachusetts death act for a *REMEDY*, it is by no means clear whether the defendant's liability is to be determined by application of the substantive law of Massachusetts, as ultimately determined by the Supreme Judicial Court of that Commonwealth, or whether its liability is to be determined by application of the general maritime law, as ultimately declared by the Supreme Court of the United States.

"The latter court, so far as we have been able to determine, has never addressed itself specifically to the question. In the courts of appeals, however, it has been held several times that one who seeks to recover under a state death statute for a tort occurring on the navigable waters of the state may do so only in accordance with the substantive law of the state in which the tort was committed. See Feige v. Hurley, 89 F. (2d) 575, 578 (C.A., 6, 1937); Klingseisen v. Costanzo Transp. Co., 101 F. (2d) 902, 903; (C.A., 3, 1939) and cases cited, followed and re-affirmed in The H.S., Inc., No. 72, 130 F. (2d) 341, 343 (C.A., 3, 1942) and Puleo v. H. E.

Moss & Co., 159 F. (2d) 842, 845 (C.A., 2, 1947) cert. den., 331 U.S. 847. *But these cases were all decided prior to Pope & Talbot, Inc. v. Hawn*, 346 U.S. 406 (1953) wherein the Supreme Court of the United States in a civil action on the law side under the saving clause *for the first time held categorically* that the rights of a shore worker to recover for personal injuries short of death occurring on a vessel in the *navigable waters* of a state resulting from either the negligence of the shipowner or the unseaworthiness of the vessel are to be *determined by the general maritime law and not by the law of the state* within whose waters the accident occurred. That case, of course, is not squarely in point here, but in the Court's opinion at page 409 it is said by way of dictum that *"Even if Hawn were seeking to enforce a state created REMEDY for this RIGHT, (referring to his right of recovery for unseaworthiness and negligence) federal maritime law would be controlling." Indeed, in our opinion it would be incongruous to hold in conformity with Pope & Talbot, Inc. v. Hawn, supra, that the maritime law determined the respective rights of the parties in the event of personal injuries short of death, but that state law determined their rights in the event of injuries resulting in the ultimate consequence of death.* And, it would be even more incongruous to hold that the husband's right of action, which the plaintiff here asserts in her count two under the local survival statute, is to be determined under the rule of Pope & Talbot by the maritime law, but that the right of action arising out of the same ac-

cident conferred directly upon her by the local death act is to be determined by local law. Furthermore, as the Supreme Court pointed out in Chelentis v. Luckenbach S.S. Co., 247 U.S. 372, 384 (1918), the saving clause reveals no intention that liability as well as remedy shall be determined by the common law rather than the maritime law, and to apply state substantive law to determine the rights of the parties would create divergence in a field where uniformity has long been considered important. See also Chief Judge Magruder's discussion in Doucette v. Vincent, 194 F. (2d) 834, 839, et seq. (C.A., 1, 1951)."

In conclusion, therefore, it is submitted that the law prescribed by the *Pope & Talbot* and *O'Leary* cases, as applied to the facts of the case before this Court, is as follows:

The incident whereby the BYRD car *went off the ferry into the Mississippi River (1) occurred over NAVIGABLE WATERS, (2) as a result of the NEGLIGENCE of Respondent. Therefore, notwithstanding it occurred within the boundaries of the State of Louisiana, it was an action based upon a MARITIME TORT.*

(Thus — "But he (Hawn) was injured on *navigable waters . . . Consequently, the basis of Hawn's action is a maritime tort." Pope & Talbot v. Hawn,* supra). And the fact that one is killed, instead of injured, does not prevent it from being a maritime tort, so long as it occurred over navigable waters.

There is nothing in the *Pope & Talbot* doctrine which confines its applicability to actions for personal injury, and which excludes those for wrongful death. The test is not whether the action is for injury or death. The test is whether or not the action is based on a *"MARITIME TORT"; maritime*, meaning "occurred over navigable waters" and *tort*, meaning "negligence".

According to the doctrine of *Pope & Talbot*, if the action is based on (1) negligence and (2) occurred over navigable waters, then the basis of the action is a *maritime tort*, "a type of action which the Constitution has placed under national power to control" and of which a state may not deprive. And, if the action is based on a *maritime tort*, the federal admiralty courts will apply *maritime law* (of mitigation of damages).

Mr. and Mrs. Byrd, like all passengers on the ferry, had a *maritime RIGHT of action* against the shipowner for unseaworthiness or for negligence occurring over navigable waters. As stated in Mr. Justice Frankfurter's concurring opinion in *Pope & Talbot v. Hawn*, business invitees, passengers, freight consignees and longshoremen, always had a *RIGHT* to sue a shipowner in admiralty for negligence, occurring over navigable waters. These are *RIGHTS which are rooted in maritime law*. These are federal maritime causes of action. A right of action of a passenger to sue a shipowner for negligence occurring over navigable waters, is not an action rooted in state law.

Since Mr. Byrd was killed, his widow had no federal remedy to enforce his maritime right. However, the State of Louisiana SUPPLEMENTED maritime law by providing

a state-created remedy (Article 2315) by which the widow, Mrs. Byrd, was given remedies for survival and for wrongful death. And, since Louisiana law may SUPPLEMENT — but NOT DEPRIVE — a person of any substantive admiralty rights, even though Mrs. Byrd uses her state-created remedy (Article 2315), the federal maritime law (of mitigation of damages) is controlling.

This is especially so in the instant case wherein the state-created remedy — the statutory provision of the Louisiana Civil Code (Article 2315) — does not contain any reference or basis for the doctrine of contributory negligence. In fact, there is no basis for the doctrine anywhere in the entire Civil Code, and its only source in Louisiana law is from the common law of other states.

CONCLUSION

It is respectfully submitted that the question here presented is of utmost importance in every case involving a death resulting from a maritime tort occurring within the boundaries of a state. The issues are basic and the question presented warrants review for the following vital reasons:

(1) To enforce and re-enforce the soundly established principles of maritime law — to the effect that a maritime tort is subject to federal maritime law and policies and, therefore, states may supplement, but not deprive, a person of any substantial admiralty rights — as announced in *Pope & Talbot v. Hawn, supra; Panama R. Co. v. Johnson, supra;* and *Garrett v. Moore-McCormack, supra.*

(2) To clarify the opinion and the scope of the holding in *Pope & Talbot v. Hawn, supra;* to assure that federal maritime law (of mitigation of damages) — and not state jurisprudence (contributory negligence as a complete bar) — should be applied in an action in admiralty by a widow of a passenger on a ship, who was killed as a result of a maritime tort occurring within the boundaries of a state, where the widow avails herself of the state wrongful death statute to supplement the general maritime law.

(3) To settle the conflict between the Fifth Circuit, which erroneously we submit, herein applied to a maritime tort the common law jurisprudence of the state under which slight contributory negligence completely barred any recovery, and the contrary holding of the First Circuit in *O'Leary v. U. S. Lines, supra;* which, we submit, correctly applied to the maritime tort the federal maritime law of mitigation of damages.

Respectfully submitted,

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CERTIFICATE

I certify that a copy of the foregoing brief has been served upon opposing counsel of record by placing the same properly addressed in the United States mail with adequate postage affixed thereto.

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I.

APPENDIX

OPINION OF THE COURT
Filed: December 30, 1955

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 15,516

THE NAPOLEON AVENUE FERRY COMPANY, INC.,
Appellant,

versus

MRS. KATIE LYONS BYRD,
Appellee,

No. 15,516 and

MRS. KATIE LYONS BYRD,
Appellant,

versus

THE NAPOLEON AVENUE FERRY COMPANY, INC.,
Appellee.

(December 30, 1955)

Appeals from the United States District Court for the Eastern District of Louisiana

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Before BORAH and JONES, Circuit Judges, and DAWKINS, Sr., Benjamin C., District Judge.

PER CURIAM:

The judgment of the District Court is affirmed on the opinion below, Byrd v. Napoleon Avenue Ferry Company, 125 F. Supp. 573.